89-5900

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

JOHN E. RUST,

Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY GRAMMER, FRANCIS X. HOPKINS, MARIO PEART, JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS ADAMS, ROBERT BENSON, TERRY KIENE, RUSSELL SCHUSTER, MICHAEL R. FORD, KARL EISBACK, NEBRASKA STATE PENITENTIARY HOUSING UNIT #4 CORRECTIONAL OFFICERS/CORPORALS, NEBRASKA STATE PENITENTIARY CLASSIFICATION COMMITTEE MEMBERS,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW Petitioner, John E. Rust, and moves pursuant to 28 U.S.C. §1915 for leave to proceed in forma pauperis in seeking a writ of certiorari before this Court.

In support of this motion, Petitioner has attached his affidavit which has been prepared pursuant to Supreme Court Rule 46.

Respectfully submitted,

John E. Rust

P.O. Box 2500
Lincoln, Nebraska 68502-0500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Proceed in Forma Pauperis, together with a copy of the Petitioner's Poverty Affidavit filed herewith, was sent to the Respondents' Attorney: Marie C. Pawol, Assistant Attorney General, 2115 State Capitol Building, Lincoln, Nebraska 68509, by United States mail, postage prepaid, this 23rd day of October, 1989.

John E. Rust

89-5900

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

JOHN E. RUST, Petitioner, vs. FRANK O. GUNTER, et al., Respondents.	AFFIDAVIT IN SUPPORT OF MOTION TO SEEK A WRIT OF CERTIORARI IN FORMA PAUPERIS

I, JOHN E. RUST, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion seeking a writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for writ of certiorari are true.

1. Are you presently employed?

   a. No. (incarcerated since 1975 under sentence of death.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. No.

3. Do you own any cash or checking or savings accounts?

   a. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   a. none

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John E. Rust

John E. Rust, Petitioner

SUBSCRIBED AND SWORN to before me on this 23 day of Oct 1989.

Jo Gray

NOTARY PUBLIC

GENERAL NOTARY State of Nebraska
JO GRAY
My Comm. Exp. March 13, 1991

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

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JOHN E. RUST,

Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY GRAMMER, FRANCIS X. HOPKINS, MARIO PEART, JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS ADAMS, ROBERT BENSON, TERRY KIENE, RUSSELL SCHUSTER, MICHAEL R. FORD, KARL EISBACK, NEBRASKA STATE PENITENTIARY HOUSING UNIT #4 CORRECTIONAL OFFICERS/ CORPORALS, NEBRASKA STATE PENITENTIARY CLASSIFICATION COMMITTEE MEMBERS

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JOHN E. RUST - Pro se

P.O. Box 2500
Lincoln, Nebraska 68502-0500

QUESTIONS PRESENTED

1. Whether a new statute, and its most recent statutory interpretation, in conjunction with the subsequent enactment of new rules and regulations to allow imposition of solitary confinement are ex post facto when applied retrospectively to Petitioner whose criminal offenses were committed prior to the enactment of the statute, and its recent interpretation, and the subsequent enactment of rules and regulations.
2. Whether the imposition of solitary confinement upon Petitioner, totally without penological justification, involves unnecessary infliction of pain and is grossly disproportionate to the end to be achieved or the crime warranting imprisonment.
3. Whether some type of meaningful periodic review of the conditions of death row confinement is required to insure that conditions do not violate the Constitution.
4. Whether Petitioner has stated a claim upon which relief may be granted.

LIST OF PARTIES

The parties to the proceedings below and before this Court is the petitioner John E. Rust and respondents Frank O. Gunter, Harold W. Clarke, Gary Grammer, Francis X. Hopkins, Mario Peart, John T. Eggers, Roger Pehrson, Douglas Adams, Robert Benson, Michael R. Ford, Karl Eisback, Nebraska State Penitentiary Officers/ Corporals, Nebraska State Penitentiary Classification Committee Members.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN E. RUST, Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY GRAMMER, FRANCIS X. HOPKINS, MARIO PEART, JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS ADAMS, ROBERT BENSON, TERRY KIENE, RUSSELL SCHUSTER, MICHAEL R. FORD, KARL EISBACK, NEBRASKA STATE PENITENTIARY HOUSING UNIT #4 CORRECTIONAL OFFICERS/ CORPORALS, NEBRASKA STATE PENITENTIARY CLASSIFICATION COMMITTEE MEMBERS, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner John E. Rust respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the entitled proceeding on 19 October 1989.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Eighth Circuit has not been reported. This judgment and opinion appears as Appendix A of this Petition.

The judgment of the United States District Court for the District of Nebraska (Urbom, D.J.) has not been reported. This judgment appears as Appendix B of this Petition.

The report and recommendation of the Magistrate for the United States District Court for the District of Nebraska has not been reported. This report and recommendation appears as Appendix C of this Petition.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the petitioner brought this suit in the District of Nebraska. On 16 June 1989, the District Court ordered the complaint dismissed for failure to state a claim upon which relief may be granted. See Appendixes B and C, infra.

On petitioner's appeal, the Eighth Circuit on October 1989, entered a judgment and an opinion affirming the District Court's judgment. See Appendix A, infra. Petitioner did not seek a petition for rehearing.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the following provisions of Nebraska Law.

29-2204. Sentence; term of imprisonment; hard labor; solitary confinement; defendent under eighteen years of age; disposition under provision of juvenile courts. (1) Except as provided in subsection (2) of this section, in all cases when any person shall be convicted of any offense by this code declared criminal, and made punishable by imprisonment in the Department of Correctional Services adult correctional facility, the court shall declare in its sentence for what period of time, within the respective periods prescribed by law, such convict shall be imprisoned at hard labor in the Department of Correctional Services adult correctional facility; and shall moreover determine and declare in its sentence whether any such convict shall be kept in solitary confinement in cells of the Department of Correctional Services adult correctional facility, without labor, and if so, for what period of time.

83-4,109. Adult institutions; disciplinary procedures; how administered. Disciplinary procedures in adult institutions administered by the Department of Correctional Services shall be governed by the provisions of sections 83-4,109 to 83-4,123.

83-4,111. Department of Correctional Services; rules and regulations; purpose contents; rights and privileges of inmates. (1) Within sixty days after July 10, 1976, the department shall adopt and promulgate rules and regulations to establish criteria for justifiably and reasonably determining which rights and priv-

ileges a committed person retains.

(2) Such rules and regulations shall include, but not be limited to, criteria concerning (a) disciplinary restrictions on clothing, bedding, facilities, mail, and visitations in an institution, (b) solitary confinement, (c) grievance procedures, hearings, and review, (d) good-time credit, (e) criteria for psychological treatment and sociological development programs, (f) rehabilitation opportunities, and (g) educational or employment programs.

(3) The rules and regulations adopted pursuant to sections 3-4,109 to 83-4,123 shall in no manner deprive an inmate of any rights and privileges to which such person is entitled under other provisisons of law or under policies adopted in a correctional institution.

83-4,114. Disciplinary restrictions and punishment; degree; solitary confinement; duration; exceptions. There shall be no corporal punishment or disciplinary restrictions on diet. Disciplinary restrictions on clothing, bedding, mail, visitations, use of toilets, washbowls, or scheduled showers shall be imposed only for abuse of such privilege or facility. No person in the adult division shall be placed in solitary confinement for disciplinary reasons for more than fifteen consecutive days, or more than thirty days out of any forty-five day period, except in cases of violence or attempted violence committed against another person or property when an additional period of isolation for disciplinary reasons is approved by the warden. This provision shall not apply to segregation or isolation of persons for purposes of institutional control.

STATEMENT OF THE CASE

On approximately 1 August 1975, petitioner John E. Rust was convicted for the commission of the 21 February 1975 criminal offenses of First Degree Murder in perpetration of or attempt to perpetrate a robbery and three (3) counts of Shooting with Intent to Kill, Wound or Maim. On approximately 30 October 1975, petitioner was sentenced to death for the First Degree Murder in perpetration of or attempt to perpetrate a robbery and to three (3)

sentences of 16 2/3 to 50 years for each count of Shooting with Intent to Kill, Wound or Maim. Each of petitioner's four (4) sentences are to be served concurrently. The sentencing court did not order that petitioner be kept in solitary confinement for any period of time between the sentence of death and execution thereof or for any period of time by virtue of each of the three sentences of 16 2/3 to 50 years.

On 21 February 1975, when petitioner's criminal offenses were committed, Neb. Rev. Stat. §29-2204 (Reissue 1985) expressly gave the trial court the power to declare whether a convict shall be kept in solitary confinement, and if so, for what period of time. On approximately 10 July 1976, Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) was enacted into law.

That inmates sentenced to the death penalty were allowed to reside in the general population of the Nebraska State Penitentiary from 1975, when the first Nebraska inmate was sentenced to the death penalty in August 1975, through approximately June 1978, when an administrative decision was made to permanently segregate all inmates sentenced to the death penalty. From August 1975 through 8 June 1978 the administrative practice and policy was that whenever an execution date was fixed for an inmate sentenced to the death penalty, said inmate was removed from the general population during the pendency of the fixed execution and was returned to the general population when the execution date was stayed. The inmate was confined in close confinement, under administrative detention, pursuant to Rule 6(14)(a)(vii) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations (hereinafter referred to as "NDCS Rule 6(14)").

On approximately 27 October 1977, petitioner was informed that he was being removed from the general population of the Nebraska State Penitentiary (hereinafter referred to as "NSP") and confined in the NSP's Adjustment Center under Administrative Detention because the Nebraska Supreme Court had set an execution date and that petitioner would be returned to the general population when he had received a stay of his execution date. On approximately 19 January 1978, petitioner's execution date of 23 January 1978 was

stayed until 24 April 1978. On approximately 17 April 1978, petitioner received an indefinite stay ~~of his execution~~ day.

On approximately 8 June 1978, an administrative decision was made to permanently segregate all inmates sentenced to the death penalty in administrative detention pursuant to NDCS Rule 6(14). This decision was based upon two (2) "conclusive" or "irrebuttable" presumptions: "That inmates sentenced to the death penalty have a greater potential of suicide than the average inmate, and there is greater risk of attempted escape. In addition, administrators have determined that such inmates constitute a threat to the good order, safety and security of the institution."

That approximately May 1978, former Nebraska Department of Correctional Services Director Joseph Vitek sent a letter to Nebraska Civil Liberties Union Executive Director stating that petitioner would be reviewed for placement in the general population of the Nebraska State Penitentiary since petitioner's date of execution was no longer fixed. On approximately 8 June 1978, pursuant to NDCS 6(14), former Deputy Warden Thomas K. Mason sent the petitioner a detailed written explanation which stated that Mr. Mason had reviewed petitioner's status and had determined that the petitioner would remain in administrative detention due to his still being under the sentence of death. On approximately 8 June 1978, pursuant to NDCS Rule 6(14), former Deputy Warden Thomas K. Mason sent a similar detailed written explanation to each of the other inmates under the death penalty which informed them that they would be confined in administrative detention because they were under the sentence of death.

On approximately 26 November 1984 and 5 December 1984, two Death Row schedules were promulgated which resulted in the solitary confinement of all inmates sentenced to the death penalty. On or about September 1985, NDCS Rule 6(14) was officially repealed and replaced with Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations (hereinafter referred to as "NDCS Rule 6(16)"). That NDCS Rule 6(16) is derived from Neb. Rev. Stat. §83-4,114 (Reissue 1987).

Respondents utilize the same "conclusive" or "irrebuttable"

presumptions, which have been utilized since 8 June 1978, to justify the segregation of inmates, sentenced t· the death penalty, in indefinite/permanent solitary confinement. Respondents have never put forth any evidence to establish that an emergency resulting in a new factual situation, or any legitimate penological interests, existed to necessitate the new interpretation of §83-4,114 and the subsequent enactment of new rules and regulations to terminate petitioner's close confinement, in order to impose indefinite/permanent solitary confinement.

Prior to the enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the repeal of NDCS Rule 6(14), the respondents interpreted and applied the solitary confinement, for purposes of institutional control, provisions of §83-4,114 and NDCS Rule 6(16) to selected inmates who warranted such confinement, but was not applied to inmates sentenced to the death penalty.

The 26 November 1984 and 5 December 1984 Death Row schedules and NDCS Rule 6(16) were enacted pursuant to the legislatively delegated rule making authority of Neb. Rev. Stat. §§83-173, 83-4,111 and 83-4,114 (Reissue 1987) and have the force and effect of statutory law. The Nebraska Legislature's enactment of §§83-4,111 and 83-4,114 and the respondents' new interpretation/application of §83-4,114 and their enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16), to allow the solitary confinement of inmates sentenced to the death penalty, occurred well after the 21 February 1975 commission of petitioner's four (4) criminal offenses.

The factual situation of petitioner's ex post facto question is distinguishable from the factual situation of the ex post facto question in Palmer and Reeves v Gunter, et al., No. 89-5586, petition for a writ of certiorari docketed on 15 September 1989. Petitioner's criminal offenses were committed before the Legislature enacted §83-4,114, whereas, Palmer and Reeves' criminal offenses were committed after the enactment of §83-4,114 but prior to the respondents' new interpretation of §83-4,114 and subsequent enactment of rules and regulations to retrospectively impose solitary confinement.

The legislative history of Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) establishes that the legislative intent of LB275 is to bring Nebraska into conformity with the Court's decision in Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) and to establish due process standards for disciplinary proceedings. That under §§83-4,109 to 83-4,123 petitioner's placement in solitary confinement can be triggered only by certain events: violation of certain rules and/or is a threat to the good order, safety and security of the institution and only after being provided with the minimum requirements of procedural due process to ascertain whether or not these events have occurred or exist.

The respondents have determined that the petitioner should be segregated in solitary confinement based upon the "conclusive" or "irrebuttable" presumptions detailed supra at 5. These "conclusive" or "irrebuttable" presumptions constitute an event which require minimum requirements of procedural due process to ascertain whether or not these specified events have occurred or exist. Respondents have refused to provide petitioner with the minimum requirements of procedural due process prior to or after his placement in solitary confinement since 26 November 1984.

On or about 19 March 1986, petitioner was officially placed under the Nebraska Department of Correctional Services Classifcation system. Petitioner is classified and assigned to the Administrative Segregation status of Administrative Confinement. Respondents have consistently refused to provide petitioner with the mandatory due process procedures required by the State of Nebraska Department of Correctional Services Adult Inmate Classification Manual (hereinafter referred to as the "Custody Classification Manual"), Administrative Regulations and Operational Memorandums which have the force and effect of statutory law due to their having been enacted under the legislatively delegated rulemaking authority of §§83-173, 83-108.02, 83-178, and 83-179 (Reissue 1987).

Respondents have consistently refused to conduct any type of meaningful review of petitioner's confinement status in order to ascertain whether he should be released from solitary confinement or whether or not the solitary confinement has become cruel and

unusual punishment.

REASONS FOR GRANTING THE WRIT

THE RETROSPECTIVE IMPOSITION OF SOLITARY CONFINEMENT PURSUANT TO A STATUTE, ITS MOST RECENT STATUTORY REINTERPRETATION, AND THE ENACTMENT OF NEW RULES AND REGULATIONS, IS EX POST FACTO WHEN APPLIED TO PETITIONER WHOSE CRIMINAL OFFENSES WERE COMMITTED PRIOR TO THE ENACTMENTS AND REINTERPRETATION.

The Eighth Circuit's decision directly conflicts with the Court's decisions in In re Medley, 134 U.S. 160 (1890); Holden v Minnesota, 137 U.S. 483 (1890); Cummings v Missouri, 71 U.S. (4 Wall.) 277 (1867); Rooney v North Dakota, 196 U.S. 319 (1905). The Court has explicitly recognized that pre-execution confinement is a distinct punishment, and one that may be considered completely severed from the punishment of death. In re Medley, 134 U.S. 160, 171 (1890). This Court in Weaver v Graham, 450 U.S. 24 (1981) stated that the following precedent is still law:

> (W)e have held that a statute may be retrospective even if it alters punitive conditions outside the sentence. Thus, we have concluded that a statute requiring solitary confinement prior to execution is ex post facto when applied to someone who committed a capital offense prior to its enactment, but not when applied only prospectively. Compare In re Medley, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890), with Holden v Minnesota, 137 U.S. 483, 11 S.Ct. 143, 34 L.Ed. 734 (1890). See also Cummings v Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867).

Id. at 32. Also, respondents' official post-sentence action of reinterpreting §83-4,114 to allow the retrospective imposition of the additional punishment of solitary confinement pursuant to the enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16) runs afoul of the ex post facto clause. See Shepard v Taylor, 556 F.2d 648, 654 (2d Cir. 1977); Love v Fitzharris, 460 F.2d 382, 384-85 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1973); Greenfield v Scafati, 277 F. Supp. 644 (D. Mass. 1967)(three-judge court), summarily aff'd, 390 U.S. 713 (1968); Warden v Marrero, 417 U.S. 653, 663 (1974). This result follows even if the maximum statutory penalty for the crime remains unchanged. See Lindsey v Washington, 301 U.S. 397, 401 (1937).

Many courts have recognized that the ex post facto clause applies with equal force to administrative actions which have the effect of punishing or increasing the punishment for conduct occur-

ring before the administrative change. See Holguin v Raines, 695 F.2d 372, 374 (9th Cir. 1982); Geraghty v United States Parole Commission, 579 F.2d 238, 266 (3d Cir. 1978), vacated on other grounds, 445 U.S. 388 (1980); Love v Fitzharris, 460 F.2d 382, 385 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1983); Piper v Perrin, 560 F. Supp. 253, 256 & n. 6 (D.N.H. 1983). As the Third Circuit Court of Appeals stated in Geraghty:

> (A) similar prohibition (against ex post facto laws) applies to an increase in punishment brought about by the rule-making, the administrative equivalent of legislation. The legislature cannot, by delegation, escape constitutional limitations on its power.

579 F.2d at 266. The bar upon ex post facto laws cannot be evaded by giving administrative form to laws with a "criminal" or "punitive" effect since the prohibition is directed at the substance and not the form of the legislation,

> (W)hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding. Cummings v Missouri, 71 U.S.(4 Wall.) 277, 325 (1867); United States v Bize, 86 F. Supp. 939, 946 (D. Neb. 1949).

The Eighth Circuit's summary disposition, pursuant to 8th Cir. R. 12(a), is a misapplication of the law to the facts of the instant case. The Eighth Circuit cites its recent opinion in Palmer v Gunter, No. 88-2245 (filed 24 May 1989)(unpublished per curiam), petition for cert. filed, Palmer v Gunter, No. 89-5386 (filed 15 September 1989), to affirm the district court. Petitioner will, therefore, address the misapplication of the law in Palmer, as extended to petitioner's case by the Eighth Circuit's summary disposition on the ex post facto issue.

The Eighth Circuit's finding that placement in solitary confinement is to enhance the orderly administration of the institution and does not constitute an additional punishment is not supported by the evidence. A similar argument/finding was rejected by the Court in In re Medley, 134 U.S. 160 (1890). The Medley Court

expressly rejected the argument of the counsel for the State of Colorado and the opinion of Judge Hayt (In re Tyson, 22 Pac. 810 (1889)) that solitary confinement was referable to the penal administration for the safekeeping of the prisoner and is not relieved of its objectionable features by the qualifying language. Id. at 167.

For ex post facto purposes, whether a retrospective state statute or administrative rule ameliorates or worsens conditions imposed by its predecessor is a federal question and the inquiry looks to the challenged provision and not to any special circumstance that may mitigate its effect on a particular individual. See Weaver v Graham, 450 U.S. 24, 33 (1981). The text of NDCS Rule 6(16) does not mitigate the punitive effect of solitary confinement for it expressly declares that "Solitary Confinement is the status of confinement in an individual cell having solid, soundproof doors, and depriving the offender of all visual and auditory contact with other persons", thus, petitioner is left to the worst form of solitary confinement. See Medley, at 169.

The Court in In re Medley, 134 U.S. 160 (1890) recognized the adverse effects of solitary confinement upon inmates:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better . . . did not recover sufficient mental activity to be of any subsequent service to the community.

Id. at 168. See also, Solitary Confinement as Psychological Punishment, 13 Calif. W. L. Rev. 265 (1977)(prisoners confined in solitary confinement for long periods revert to irrational and bizzare behavior, eventually exhibiting one of the following behavior patterns: (1) angry and destructive acts; (2) depressive reactions, sometimes culminating in suicidal attempts; and (3) withdrawn and psychotic behavior).

The Court has recognized that mental suffering from confinement under sentence of death increases the harshness of that punishment. See Medley, at 172; see also, Solesbee v Balkcom, 339 U. S. 9, 14 (1950)(dissenting opinion)(In the history of murder, the

onset of insanity while awaiting execution of a death sentence is not a rare phenomenon). This solitary confinement cannot be viewed or considered as a tool to enhance the orderly administration of the institution. Petitioner is subjected to the respondents' unbridled discretion to repeal and enact rules and regulations that results in the imposition of the historical punishment of solitary confinement. See Medley, at 167-170. Therefore, respondents' imposition of solitary confinement can only be viewed as additional punishment.

The Eighth Circuit cites Malloy v South Carolina, 237 U.S. 180, 183 (1915) in support of its affirmance of the district court's conclusion that the ex post facto clause is not implicated by the imposition of solitary confinement on death row inmates. A careful reading of that case reveals that it is inapplicable to the case at bar.

In Malloy v South Carolina, supra, the Court, in response to the meticulous objection based upon change of place for execution and increased number of witnesses, referred to what "this Court said through Mr. Justice Harlan in Holden v Minnesota, 137 U.S. 483, 491, and Rooney v North Dakota, 196 U.S. 319, 325, 326. The Constitutional inhibition of ex post facto was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary for the orderly infliction of humane punishment." Id. at 183. While that may be true, it is simply not the issue in the case at bar.

In Malloy v South Carolina, supra, the issue presented to the Court was whether the Act of Legislature, approved 17 February 1912, prescribing electrocution as the method of producing death instead of hanging, fixed the place therefor within the penitentiary, and permitted the presence of more invited witnesses than had theretobefore been allowed. First, the Eighth Circuit's quotation from Malloy, at 183, dealt with only the objections based upon change of place for execution and increased number of witnesses which is not the issue in the case at bar. Second, the Malloy Court's referring to Holden and Rooney was solely for the same facts of the

specific objections based upon change of place for execution and increased number of witnesses. Third, the Malloy Court did not address the retrospective imposition of solitary confinement since the South Carolina statute did not prescribe solitary confinement in the penitentiary. Fourth, the Holden and Rooney cases, cited in Malloy at 183, decided the additional issue of solitary confinement in the following manner: Holden held that to apply solitary confinement provision to anyone who committed a capital offense prior to the passage of the Act of 1889 is ex post facto; Rooney held that "close confinement" and "solitary confinement" did not import the same kind of punishment and close confinement did not increase the punishment to the disadvantage of the accused. Therefore, the Malloy holding is only applicable to the specific issue of change of place for execution and increased number of witnesses which does not increase the severity of the punishment like solitary confinement.

That prior to and after the reinterpretation of §83-4,114 and the enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16), respondents segregated inmates sentenced to the death penalty pursuant to the same two "conclusive" or "irrebuttable" presumptions, supra, at 5. Respondents have never put forth any evidence, of the existence of an emergency or new factual situation or any legitimate penological interest, which altered the existing "conclusive" or "irrebuttable" presumptions, to necessitate the reinterpretation of §83-4,114 and the subsequent enactment to the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16) to terminate petitioner's close confinement, in order to impose indefinite/permanent solitary confinement. That respondents' bare assertion that solitary confinement of petitioner, based upon the same two "conclusive" or "irrebuttable" presumptions utilized for the prior close confinement of inmates sentenced to the death penalty, as an appropriate means of maintaining good order, safety, and security of the institution, is not enough. See Rudolph v Locke, 594 F.2d 1076, 1077 (5th Cir. 1979); Turner v Safely, __ U. S. __, 107 S.Ct. 2254, 2261-62 (1987). Under the standard enuncited

in Turner, at 2261-62, the placement of petitioner in solitary confinement is not reasonably related to legitimate penological interests, since it constitutes an exaggerated response to the situation.

That prior to the enactment of §§83-4,111(2)(b) and 83-4,114 the Nebraska Department of Correctional Services utilized solitary confinement as a disciplinary sanction. See Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974). The Nebraska Supreme Court has held "That §§83-4,109 to 83-4,123 constitute a special act relating to disciplinary procedures in adult correctional institutions." See Reed v Parratt, 207 Neb. 796, 798, 301 N.W.2d 343, 345 (1981). The legislative history of §§83-4,109 to 83-4,123 establishes that the legislative intent was to bring Nebraska into conformity with the United States Supreme Court in Wolff, supra, and to establish due process standards for disciplinary proceedings administered by the Department of Correctional Services. Thus, under Nebraska law, solitary confinement is a disciplinary procedure for purposes of penal administration.

That Neb. Rev. Stat. §29-2204 (Reissue 1985) was the only statute to allow for imposition of solitary confinement, upon the petitioner, on the date his criminal offenses were committed. That §29-2204 expressly gives the trial court the power to declare whether a convict shall be kept in solitary confinement, and if so, for what period of time. State v Stratton, 220 Neb. 854, 860, 374 N.W.2d 31, 35 (1985). The trial or sentencing court did not order that petitioner be kept in solitary confinement for any period of time between the sentence of death and execution thereof or for any period of time by virtue of each of the three sentences of 16 2/3 to 50 years. It is obvious that the enactment of §83-4,114 on approximately 10 July 1976, the reinterpretation of §83-4,114 which resulted in the subsequent enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16) confer upon respondents a power that had been solely confided to the trial court pursuant to §29-2204, and is a departure from the law as it stood when petitioner's criminal offenses were committed. See In re Medley, 134 U.S. at 172.

An analysis, under DeVeau v Braisted, 363 U.S. 144, 160 (1960) (relevant inquiry for determining whether a particular restriction violates the Ex Post Facto Clause) and Turner, at 2261-62, as to the reasonableness of petitioner's solitary confinement, would reveal an exaggerated response to the situation and an intent to punish, which constitutes a violation of the Ex Post Facto Clause. (I)t is equally plain that the existence of the death penalty is not a license to the respondents to devise any punishment short of death within the limits of their imagination. See Trop v Dulles, 356 U.S. 86, 99 (1958)

II

THE EIGHTH AMENDMENT PROHIBITS CONDITIONS OF CONFINEMENT THAT ARE TOTALLY WITHOUT PENOLOGICAL JUSTIFICATION AND INVOLVES UNNECESSARY INFLICTION OF PAIN AND IS GROSSLY DISPROPORTIONATE TO THE END TO BE ACHIEVED OR THE CRIME WARRANTING IMPRISONMENT.

At the outset, it should be noted that on approximately 8 June 1978, petitioner, and other inmates sentenced to the death penalty, were segregated from the general inmate population of the Nebraska State Penitentiary based upon certain "conclusive" or "irrebuttable" presumptions, supra, at 5. These same "conclusive" or "irrebuttable" presumptions have been utilized throughout petitioner's confinement in the close confinement of Administrative Detention under NDCS Rule 6(14) and his subsequent confinement in solitary confinement under the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16). Respondents have never put forth any evidence, of the existence of an emergency or new factual situation or any legitimate penological interest, which altered the existing "conclusive" or "irrebuttable" presumptions, to necessitate the reinterpretation of §83-4,114 and the subsequent enactment of the 26 November 1984 and 5 December 1984 Death Row schedules and the September 1985 NDCS Rule 6(16)to terminate petitioner's close confinement, in order to impose indefinite/permanent solitary confinement.

That respondents' bare assertion that solitary confinement of petitioner, and other inmates sentenced to the death penalty, based upon the same two "conclusive" or "irrebuttable" presumptions

utilized for the prior close confinement of inmates sentenced to the death penalty, as an appropriate means of maintaining good order, safety, and security of the institution, is not enough. See Rudolph v Locke, 594 F.2d 1076, 1077 (5th Cir. 1979); Turner v Safely, ___ U.S. ___, 107 S.Ct. 2254, 2261-62 (1987). This unreviewable discretion of the respondents should not be open-ended or interminable. See Hoitt v Vitek, 497 F.2d 598, 600 (1st Cir. 1974).

The simple fact that petitioner is under a sentence of death is insufficient to allow the respondents to confine him in solitary confinement for a period approaching indefinite/permanent segregation. More is required. Although no court has ever addressed the question of what precisely is required to support lengthy administrative segregation, the decision in Morris v Travisono, 549 F. Supp. 291 (D.R.I. 1982), aff'd, 707 F.2d 28 (1st Cir. 1983) is instructive. The judge ordered the release of an inmate who had been confined in administrative segregation for eight-and-one-half years merely because the state contended (without supporting evidence) that he was a dangerous man. In doing so, the judge stated:

> After a thorough examination of the record in this case, I find that the defendants decision to house (plaintiff) in solitary confinement for the past eight-and-a-half years is without penological justification, and has resulted in the "unnecessary and wanton infliction of pain" in violation of the eighth amendment.

Id. at 295. This reasoning should apply to petitioner's administrative segregation in solitary confinement. Respondents can just as easily place petitioner in a form of administrative segregation that involves close confinement instead of solitary confinement.

The Court in In re Medley, 134 U.S. 160, 168 (1890) has recognized the adverse effects of solitary confinement upon inmates. See also, Solitary Confinement as Psychological Punishment, 13 Calif. W. L. Rev. 265 (1977). The Court has recognized that mental suffering from confinement under sentence of death increases the harshness of that punishment. See In re Medley, 134 U.S. 160, 172 (1890). See also, Solesbee v Balkcom, 339 U.S. 9, 14 (1950)(dissenting opinion). The psychological harms that are associated with death row confinement have been described as the product of life

under intense pressure resulting in varying degrees of deterioration among condemned inmates:

> (D)eath row is a pressure cooker in which feelings of helplessness, vulnerability, and loneliness are widespread; death row makes men feel trapped, suffocated, even entombed; death row produces . . . deterioration that must be strenuously resisted if prisoners are to preserve their sanity and human integrity. Condemned prisoners have few avenues of adjustment open to them and must strive, in the final analysis, to endure pressures that threaten to make deterioration their common fate. Johnson, Life Under Sentence of Death, in The Pains of Imprisonment, 129, 140 (R. Johnson & H. Toch eds. 1982).

That respondents' imposition of indefinite/permanent solitary confinement, upon inmates sentenced to the death penalty, not only will result in greater deterioration but would ultimately precipitate a more rapid fruition of most, if not all, of the alleged "conclusive" or "irrebuttable" presumptions utilized to segregate said inmates. That coupling the psychological harms normally associated with death row confinement with the additional debilitating psychological effects of solitary confinement, is intolerable. Such "deliberate indifference to serious medical needs of inmates under sentence of death" is cruel and unusual punishment. Estelle v Gamble, 429 U.S. 97, 104 (1976); see Nadeau v Helgemoe, 561 F.2d 411, 420 (1st Cir. 1977).

Petitioner's solitary confinement is totally without penological justification and is grossly disproportionate for the end to be achieved since it is not reasonably related to legitimate penological interests and is an exaggerated response to the situation. See Turner v Safely, 107 S.Ct. at 2261-62; Robinson v California, 370 U.S. 660, 667 (1962)(the means must stand constitutional scrutiny, as well as the end to be achieved). Since no emergency or new factual situation or new penological interest existed, petitioner's solitary confinement can only be viewed as disproportionate and arbitrary, and thus an unconstitutional reaction to the situation. See Jefferson v Southworth, 447 F. Supp. 179, 189 (D. R.I. 1978). Not only is the solitary confinement not justified by an emergency or new factual situation or new penological interest, it has accomplished no useful purpose at all and cannot be justi-

fied in its present severe form by any purpose whatsoever. Id. at 189. As the Court in Rooney v North Dakota, 196 U.S. 319 (1905) held:

> We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement.

Id. at 326. Thus, petitioner could be kept in close confinement as had been done prior to the reinterpretation of §83-4,114 and the subsequent enactment of the Death Row schedules and NDCS Rule 6(16).

SOME TYPE OF MEANINGFUL PERIODIC REVIEW OF THE ADMINISTRATIVE SEGREGATION OF INMATES SENTENCED TO THE DEATH PENALTY IS CONSTITUTIONALLY REQUIRED.

At the outset, it should be noted that petitioner raised these two periodic review issues in the courts below: (1) to determine the possibility of petitioner's release to the general population, and (2) to determine whether or not petitioner should be given greater privileges while he is confined in administrative segregation. However, in the case at bar, petitioner is raising only the second periodic review issue that the courts below failed to address. Petitioner informed the district court, in his objection to the Magistrate's Report and Recommendation, that the Magistrate failed to address the second periodic review issue. The district court failed to address petitioner's second periodic review issue. The court of appeals summary disposition of petitioner's appeal, to affirm the district court, did not address petitioner's second periodic review issue of whether he should be given greater privileges.

That Operational Memorandum 201.002.101 "Reception of Capital Inmates" specifically requires: "The Team Classification Committee for Housing Unit #4 will review the status of each inmate housed on Death Row in accordance with the established institutional review schedule." The institutional review schedule has been established pursuant to the unpublished decision in Heathman v Benson, CV81-L-227 (D. Neb., Memorandum of Decision dated 9 August 1983 and Judgment dated 4 October 1983)(The Court would not approve a situation in which a prisoner was kept in solitary confinement for a great

length of time for any reason or for no reason at all and ordered that a periodic review schedule and basic guidelines be developed).

The Court in Clark v Brewer, 578 F. Supp. 1501, 1507 (S.D. Ia. 1983), aff'd as modified, 776 F.2d 226 (8th Cir. 1985) found that there is a distinction between being placed in administrative segregation and being retained in administrative segregation. Although the Hewitt Court concluded that the inmate's fifty-day term in administrative segregation did not seriously infringe on his liberty interests, this Court must address itself to the possibility of inmates seeking review of administrative segregation confinement after months or years of retention in administrative segregation. (cites omitted). Id. at 1507. The Court further held in Clark v Brewer, 578 F. Supp. at 1508:

> The length of incarceration . . . is an element that effects the weight of the inmate's interest. The longer an inmate is forced to endure the relatively restrictive . . . conditions, the more serious the deprivation of liberty. Accordingly, an inmate's interest in being given greater privileges or being released to GP increases the longer he is retained . . .. Burton v Shapp, 574 F. Supp. 637, 639-40 (W.D. Pa. 1983); see Hutto v Finney, 437 U.S. 678, 686-87, 98 S.Ct. 2565, 2571, 57 L.Ed.2d 522 (1978)(length of confinement in conditions materially different from GP is an element in determining what is cruel and unusual punishment); Jackson v Meachum, 699 F.2d 578, 584 (1st Cir. 1983)(long-term confinement itself generates a heighted due process review requirement).

Another question is whether or not an institution and the employees who work for it are bound by their own rules. The question was effectively dealt with in Douglas County Welfare Administration v Parks, 204 Neb. 570, 284 N.W.2d 10 (1979). One of the questions on appeal was whether or not the rules and regulations of an administrative agency governing proceedings before it, duly adopted and within the authority of that agency were as binding as if enacted by the legislature. The Nebraska Supreme Court held that:

> "Generally, rules and regulations of an administrative agency governing proceedings before it . . . are as binding as if they were statutes enacted by the Legislature. Likewise, procedural rules are binding upon the agency which enacts them . . . and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in

force."

Id. at 11-12.

The rule to be gleaned from this analysis is that an administrative agency's rules and regulations have the force and effect of statutory law and the agency has no authority to waive its own rules and regulations. Applied to the instant case, the respondents have no right to ignore their own rules and regulations, and those which are intended to govern their conduct. See also, Department of Banking & Finance of State v Wilken, 217 Neb. 796, 353 N. W.2d 145, 148 (1984); Smith v Sorensen, 748 F.2d 427, 431 (8th Cir. 1984)(applied Parks, supra, to Nebraska administrative regulations).

Both Ruiz v Estelle, 503 F. Supp. 1265, 1356 (S.D. Tex. 1980) and Giampetruzzi v Malcolm, 406 F. Supp. 836, 840 (D.C.N.Y. 1975) indicate that the failure by an institution to follow its own rules and regulations constitutes a violation of the injured party's due process rights. Similarly, Mayo v Lane, 867 F.2d 374, 381 n. 5 (7th Cir. 1989), citing Miller v Henman, 804 F.2d 421 (7th Cir. 1986), supports the proposition that a regulation imbued with the binding force of state law creates a liberty interest which is enforceable.

Here we have a situation in which petitioner is allowed to appear once a month before the Housing Unit #4 Team Classification Committee/Segregation Status Review Committee where he is informed that he will not be released to general population or given greater privileges because his sentence structure involves the death penalty. This refusal to conduct any type of meaningful review because petitioner's sentence structure involves the death penalty is contrary to this Court's finding, "The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner." Hewitt v Helms, 459 U.S. 460, 477 n. 9 (1983); see Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985) and the respondents' own rules and regulations contained in Operational Memorandum 201.002.101 and the Custody Classification Manual.

That prison officials must conduct some type of reasonable, periodic review of an inmate's confinement in administrative segregation is constitutionally required. Hewitt v Helms, 459 U.S. 460,

477 n. 9 (1983); Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985). Allegations that petitioner is not receiving meaningful reviews of his administrative segregation status states a claim upon which relief can be granted. See Winfrey v Brewer, 570 F.2d 761, 765 n. 5 (8th Cir. 1978); Kelly v Brewer, 525 F.2d 394, 399-400 (8th Cir. 1985). In addition, the Eighth Amendment may require periodic review to insure that conditions of death row confinement do not become cruel and unusual. See Smith v Coughlin, 748 F.2d 783, 787 (2d Cir. 1984); Peterkin v Jeffes, 855 F.2d 1021, 1033 (3d Cir. 1988).

That the mandatory language contained in the Operational Memorandum 201.002.101 and in the Custody Classification Manual have created a liberty interest that requires the respondents to conduct meaningful reviews of petitioner's administrative segregation status for the possibility of granting him greater privileges which may/would alleviate the severity of the solitary confinement conditions while he is retained in administrative segregation. Respondents refusal to comply with their own rules and regulations or to conduct meaningful reviews of petitioner's administrative segregation status is a violation of petitioner's due process rights. See Williams v Armontrout, 831 F.2d 803, 804 (8th Cir. 1987); Hewitt, supra; Mayo v Lane, supra; Ruiz v Estelle, supra; Giampetruzzi v Malcolm, supra; Douglas County Welfare Administration v Parks, supra; Department of Banking & Finance of State v Wilken, supra.

CONCLUSION

It is for these reasons, the petition for certiorari should be granted.

Respectfully submitted,

John E. Rust

John E. Rust #30118
Pro Se

P.O. Box 2500
Lincoln, Nebraska 68502-0500

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 89-2156NE

John R. Rust, Appellant, vs. Frank O. Gunter, Harold W. Clarke, Gary Grammer, Francis X. Hopkins, Marion Peart, John R. Eggers, Roger Pehrson, Douglas Adams, Robert Benson, Terry Kiene, Russell Schuster, Michael R. Ford, Karl Eisback, each individually and in their official capacities, Nebraska State Penitentiary Housing Unit #4 Correctional Officers/ Corporals, each individually and in their official capacities, Nebraska State Penitentiary Classification Committee Members, each individually and in their official capacities, Appellees.	*	Appeal from the United States District Court for the District of Nebraska

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties without oral argument.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. See 8th Cir. R. 12(a).

September 21, 1989

MANDATE ISSUED, October 17, 1989

A true copy.

ATTEST: Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 89-2156

John R. Rust, Appellant, v. Frank O. Gunter, Harold W. Clarke, Gary Grammer, Francis X. Hopkins, Marion Peart, John R. Eggers, Roger Pehrson, Douglas Adams, Robert Benson, Terry Kiene, Russell Schuster, Michael R. Ford, Karl Eisback, each individually and in their official capacities, Nebraska State Penitentiary Housing Unit #4 Correctional Officers/ Corporals, each individually and in their official capacities, Nebraska State Penitentiary Classification Committee Members, each individually and in their official capacities, Appellees.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: August 29, 1989

Filed: September 21, 1989

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

John E. Rust, a death row inmate incarcerated at the Nebraska State Penitentiary (NSP), appeals from a district court order dismissing his 42 U.S.C. § 1983 action alleging constitutional violations in his initial placement and continued confinement on death row. Rust alleges that his confinement on death row violated his right to due proces and equal protection under the fourteenth amendment, the prohibition of cruel and unusual punishment under the eighth amendment, and the prohibition of ex post facto laws. The district court dismissed Rust's complaint for failure to state a claim. This decision is consistent with our recent opinion in Palmer v. Gunter No. 88-2245 (filed May 24, 1989) (unpublished per curiam). As the questions presented in this case do not require further consideration by this Court, we affirm the district court. See 8th Cir. R. 12(a).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2245

Charles J. Palmer; Randolph Reeves,

Appellants,

v.

Frank O. Gunter, Individually, and as Director of Correctional Services; Harold W. Clarke, Individually and as Warden of Nebraska State Penitentiary; Gary Grammer, Individually and as Warden of Nebraska State Penitentiary; Francis X. Hopkins, Individually, and as Deputy Warden of Nebraska State Penitentiary; Mario Peart, Individually, and as Nebraska State Penitentiary Unit Administrator; John T. Eggers, Individually and as Nebraska State Penitentiary Housing Unit #4 Unit Supervisor IIs; Robert Benson and Russell Schuster, Individually, and as Nebraska State Penitentiary Housing Unit #4 Unit Supervisors Is; Nebraska State Penitentiary Housing Unit #4 Correctional Officers/Corporals, Individually, and as Correctional Officers/Corporals; Nebraska State Penitentiary Classification Committee Members, Individually and as Members of the Institution Classification Committee,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Submitted: March 3, 1989

Filed:May 24, 1989

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

Charles J. Palmer and Randolph Reeves, death row inmates incarcerated at the Nebraska State Penitentiary (NSP), appeal pro se from the district court's order dismissing their 42 U.S.C. § 1983 action alleging constitutional violations in their initial placement and continued confinement on death row. We affirm.

Reeves was sentenced to death on September 11, 1981, and after a two-week observation period was transferred to NSP and placed on death row. Palmer was sentenced to death three times after a series of trials, appeals, and retrials for the same crime and each time was placed on death row, in August 1980, in July 1982, and finally on September 6, 1984. Neb. Rev. Stat. § 83-4,114 (reissue 1987), enacted in 1976, allows prison officials to place inmates in solitary confinement "for purposes of institutional control." In November 1984, NSP promulgated a "schedule" which resulted in the solitary confinement of death row inmates. Thereafter, NSP Rule 6(16), was promulgated which essentially mirrored the Nebraska statute allowing solitary confinement for institutional control.

On February 19, 1988, Palmer and Reeves filed the instant section 1983 action against various prison officials alleging: (1) they were denied due process in being placed on death row without having received written statements for the reason of this placement, in violation of a prison regulation promulgated on December 1, 1983; (2) application of Rule 6(16) to them violated the ex post facto clause; (3) the death row classification procedures were improper and inadequate; (4) their segregation based solely on the imposition of a death sentence violates the

equal protection clause; and (5) the ongoing solitary confinement on death row is a per se violation of the eighth amendment.[1]

The district court, adopting the detailed and thorough report of the magistrate,[2] dismissed the action pursuant to 28 U.S.C. § 1915(d) for failure to state a claim. The court concluded that individuals sentenced to death do not have a constitutional or state law liberty interest in being confined in the general prison population because placement on death row, a form of administrative segregation, is mandated by prison regulations. The court further concluded that Palmer's and Reeves's initial-placement claims either provided no basis for relief or were time-barred under the applicable four-year statute of limitations, Neb. Rev. Stat. § 25-208. The ex post facto claim was rejected on the ground that Rule 6(16) does not punish prisoners but allows prison officials to regulate the internal affairs of the institution. Finally, the court concluded that solitary confinement is not a per se eighth amendment violation. This timely appeal followed.

Whether or not a complaint is legally frivolous under 28 U.S.C. § 1915(d) is a question of law and is reviewed under the abuse of discretion standard. Nash v. Black, 781 F.2d 665, 667-68 (8th Cir. 1986). We believe the district court correctly concluded that death row inmates in Nebraska have no liberty interest in being confined in the general prison population. As the court noted, the United States Constitution does not create a protected liberty interest in remaining in the general prison population, but a state may create such an interest through its own constitution, statutes, regulations, or judicial decisions.

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[1]Palmer and Reeves also claimed Rule 6(16) constituted a bill of attainder and was unconstitutionally vague. The district court's rejection of these claims is not challenged on appeal.

[2]The Honorable David L. Piester, United States Magistrate for the District of Nebraska.

Hewitt v. Helms, 459 U.S. 460, 466-72 (1983). In the instant case an NSP prison regulation expressly mandates that individuals sentenced to death will be automatically placed on administrative detention status and housed in a separate wing of the prison. Operational Memorandum of the Nebraska Department of Corrections, No. 201.002.101. Accordingly, Palmer's and Reeves's due process claim must fail. See Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984) (New York law mandating segregation for death row inmates).

Palmer and Reeves also argue that it is a violation of the equal protection clause to treat them differently than other inmates solely on the basis of a death sentence. The district court correctly found no such violation as the stated reasons for segregation of death row inmates, prevention of suicide attempts and escapes, and the security and good order of the institution, are rationally related to NSP's policy concerning these inmates. See id. at 787-88.

The district court also correctly concluded that the ex post facto clause is not implicated by the imposition of solitary confinement on death row inmates because the purpose of such placement is to enhance the orderly administration of the institution and does not constitute an additional punishment. See Malloy v. South Carolina, 237 U.S. 180, 183 (1915) (ex post facto clause does not apply to "conditions deemed necessary for the orderly infliction of humane punishment"). Finally, the district court was correct in concluding that a death row inmate's solitary confinement is not a per se violation of the eighth amendment. See Hancock v. Unknown United States Marshal, 587 F.2d 377, 378-79 (8th Cir. 1978) (per curiam) (solitary confinement of an inmate is not a per se eighth amendment violation); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 207 (1974) (subsequent history omitted).

Accordingly, we affirm the district court pursuant to 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST,	)	CV88-L-675
Plaintiff,	)	
vs.	)	JUDGMENT
FRANK O. GUNTER, et al.,	)	
Defendants.	)	

For the reasons stated in the report and recommendation of the magistrate erroneously dated February 22, 1988,

IT IS ORDERED that the action is dismissed for failure of the complaint to state a claim upon which relief may be granted.

Dated June 16, 1989.

BY THE COURT

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST,

Plaintiff,

v.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY GRAMMER, FRANCIS X. HOPKINS, MARIO PEART, JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS ADAMS, ROBERT BENSON, TERRY KIENE, RUSSELL SCHUSTER, MICHAEL R. FORD, KARL EISBACK, each individually and in their official capacities, NEBRASKA STATE PENITENTIARY HOUSING UNIT #4 CORRECTIONAL OFFICERS/CORPORALS, each individually and in their official capacities, NEBRASKA STATE PENITENTIARY CLASSIFICATION COMMITTEE MEMBERS, each individually and in their official capacities,

Defendants.

CV88-L-675

REPORT AND RECOMMENDATION

This is a civil rights action filed pursuant to 42 U.S.C. §1983. The plaintiff is an inmate at the Nebraska State Penitentiary (NSP), who is confined pending a sentence of death. The defendants are the Director of the Nebraska Department of Correctional Services (DCS), the warden of NSP, and various other officials charged with duties pertaining to plaintiff's confinement. The complaint in this action is before the court for initial review pursuant to 28 U.S.C. §1915(d), Fed.R.Civ.P. 12(b)(6), and the local rules of this court. Martin-Trigona v. Stewart, 691 F.2d 856, 858 (8th Cir. 1982). Liberally construing the allegations of the complaint, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), I conclude that plaintiff has failed to state a claim upon which relief may be granted. Because, as explained below, further amendment of the complaint would be futile, I shall recommend dismissal of the action.

Plaintiff raises a number of procedural and substantive challenges to the constitutionality of his confinement on Death Row. The claims are asserted under the Ex Post Facto Clause, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Cruel and Unusual Punishments Clause of the Eighth Amendment. The complaint is extensive and well-pleaded, providing detailed factual support for these claims. At this stage of the proceeding all properly pleaded factual allegations are taken as true. Cruz v. Beto, 405 U.S. 319, 322 (1975). Rather than attempting to summarize them here, I shall set forth the allegations below, in conjunction with the discussion of the legal issues to which they pertain. It can fairly be said, however, that the crux of plaintiff's claim is a challenge to the authority of prison officials to place him in segregated, solitary confinement solely on the basis of his being sentenced to death.

I. EX POST FACTO CLAUSE

Plaintiff was convicted of first degree murder in the District Court of Douglas County, Nebraska in August of 1975. In October of that year a three-judge panel of that court sentenced plaintiff to death. Plaintiff was transported to NSP, and has been confined in that institution since that date.

From plaintiff's arrival at NSP until October of 1978, inmates under sentence of death were permitted to reside in the general population of the prison. Only when an execution date was fixed for an inmate was he moved to administrative segregation. In October of 1978 this policy was changed; inmates who had been sentenced to death were to be confined in administrative segregation regardless of whether a date had been fixed for the sentence to be carried out. A consent decree entered in an action in this court required certain procedures to be followed before inmates under sentence of death could be reassigned to administrative segregation. Ballew v. Bolin, CV79-L-225 (Order dated June 4, 1980). These procedures were complied with, and inmates sentenced to death were either retained in administrative segregation or moved there from the general population.

In November of 1981 prison officials transferred all of the inmates under sentence of death to D Gallery of the new Housing Unit #4 (the present Death Row). At the time, although the inmates remained on administrative segregation, they allegedly were not subject to solitary confinement. Such confinement came about through the promulgation of Death Row "schedules" by prison officials. Thereafter, DCS Rule 6(16) was adopted. The rule defined the term solitary confinement and prohibited its use for disciplinary purposes, but provided that such confinement could

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still be used "for purposes of institutional control."[1] Rule 6(16) was enacted pursuant to Neb. Rev. Stat. §83-4,114, which uses similar language. Plaintiff claims that the promulgation of Rule 6(16) in 1985 and the passage of §83-4,114 in 1976, and their application to him violate the Ex Post Facto Clause since the crimes for which he was imprisoned occurred in 1975.

"An ex post facto law is one which reaches back in time to punish acts which occurred before enactment of the law. A penal statute may also be an ex post facto enactment if it adds a new punishment to the one that was in effect when the crime was committed." Peeler v. Heckler, 781 F.2d 649, 651 (8th Cir. 1986). Plaintiff's claim would appear to fall into the latter definition of an ex post facto law, in that his placement in solitary confinement, according to him, imposes additional punishment which was not imposed at the time he was sentenced.[2]

The United States Supreme Court has succinctly framed the relevant inquiry in determining whether a particular restriction violates the Ex Post Facto Clause.

> The question in each [ex post facto] case, where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of the present situation.

DeVeau v. Braisted, 363 U.S. 144, 160 (1960). The placement of plaintiff in solitary confinement doubtless makes the conditions of his confinement less pleasant. It does not, however, enhance the severity of his sentence. Plaintiff states in the complaint

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[1] As quoted by plaintiff, Rule 6(16) provides:

> Solitary Confinement is the status of confinement in an individual cell having solid, soundproof doors, and depriving the offender of all visual and auditory contact with other persons. No offender shall be placed in solitary confinement for disciplinary reasons. This provision does not apply to the segregation or isolation of persons for purposes of institutional control.

[2] Plaintiff alleges that the Douglas County District Court did not order that he be held in solitary confinement pending execution.

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that the purpose of placing him and other Death Row inmates in solitary confinement is to enhance the control and safety of the prison, given that inmates under sentence of death have a greater potential for suicide than other inmates and there is a greater risk of attempted escape. These purposes clearly are related to the orderly operation of the prison.

Here, the clear aim of Rule 6(16), as noted above, is to allow prison officials to regulate the internal affairs of the institution. As such, the placement of plaintiff in solitary confinement is not additional punishment, but is a "mere alteration in the conditions deemed necessary for the orderly infliction of humane punishment," which is not forbidden by the Ex Post Facto Clause. Malloy v. South Carolina, 237 U.S. 180, 183 (1915). Accord Glynn v. Auger, 678 F.2d 760, 761 (8th Cir. 1982) (double celling of prisoners after sentencing not violation of Ex Post Facto Clause). See also Dyke v. Meachum, 785 F.2d 267, 268 (10th Cir. 1986) (change in classification system requiring prisoners to serve twenty percent of sentence before eligible for minimum security not violative of Ex Post Facto Clause). Placing plaintiff in solitary confinement pursuant to statutes and rules enacted subsequent to the commission of his offenses does not violate the Ex Post Facto Clause.

II. DUE PROCESS

Plaintiff's due process claims take two forms. First, he claims a liberty interest in being classified initially as any other inmate, with consideration to be given to placement in the general population. Second, he claims a right to "meaningful review" of his segregated confinement by prison officials, again with a view toward placement in the general population. Plaintiff asserts that various Nebraska statutes and DCS regulations entitle him both to initial and ongoing review of his status and, while he is given periodic reviews, they are not meaningful.

The initial inquiry in any due process case is whether there has been a deprivation of a protected interest. Board of Regents v. Roth, 408 U.S. 564, 571 (1972). If no such deprivation has occurred, due process does not require procedural protections. Protected interests may, in a few circumstances, stem from the Constitution itself. Most frequently, however, they are derived from an independent source such as state law. See id.

If plaintiff has a protected interest in being free from administrative segregation which would entitle him to initial or periodic review, it must come from state laws or regulations. The United States Supreme Court has clearly held that no protected interest in being placed or remaining in the general population of a state prison arises from the Constitution itself. Hewitt v. Helms, 459 U.S. 460, 468 (1983). Thus, it is necessary

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to examine the state statutes and regulations cited by plaintiff to determine whether they create the protected interest he claims.

A. Initial Placement

Plaintiff's first contention is that the use of solitary confinement is limited to two situations by Nebraska statutes. The first is when a sentencing court directs that solitary confinement be imposed. The second is under §83-4,114, when solitary confinement is used as a control measure. These situations may be the only in which solitary confinement may be imposed as a punitive measure. However, as the Eighth Circuit Court of Appeals has recently recognized, the limitations of §83-4,114 are applicable only to measures taken for disciplinary purposes; where those measures are imposed for legitimate, administrative purposes, the limitations of the statute do not apply. Rust v. Grammer, 858 F.2d 411, 413 (8th Cir. 1988). Indeed, the last sentence of the statute expressly provides that it does not apply to "segregation or isolation for purposes of institutional control." This language makes it clear that there are circumstances other than those outlined in the statute under which solitary confinement may be imposed. The contention that such confinement is permissible under state law in only the two circumstances outlined above must fail.

Plaintiff next contends that Neb. Rev. Stat. §§83-4,109 to 83-4,123 govern the conduct of disciplinary proceedings in Nebraska penal institutions and that these statutes create a protected interest in remaining in the general population. He asserts that these statutes, together with the decision of the United States Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974), require a due process hearing to determine whether placement of a particular inmate in solitary confinement is necessary for purposes of institutional control. This claim is without merit. By their own terms, the statutes cited by plaintiff apply only to disciplinary proceedings. See Neb. Rev. Stat. §83-4,109. There is nothing in them which applies to segregation for administrative purposes. Nor is there anything in Wolff which would be applicable to administrative segregation. Wolff dealt exclusively with solitary confinement for disciplinary purposes. These sources do not create the protected interest which plaintiff claims.

Plaintiff next focuses on certain Administrative Regulations (AR's) and Operational Memoranda (OM's) promulgated by DCS and NSP officials. He contends that these regulations together with the Classification Manual affirmatively guarantee him certain rights regarding classification and assignment. He alleges that OM 201.002.101, entitled "Reception of Capital Inmates" provides that all inmates sentenced to the death penalty are to be classified and assigned by the preparation of a classification

study in accordance with the guidelines used for the classification of regular inmates at the Diagnostic and Evaluation Unit of the Lincoln Correctional Center (LCC). Plaintiff alleges that he has never had a classification study under the LCC guidelines.

Plaintiff is correct in alleging that OM 201.002.101, a copy of which is attached to the complaint, provides for such a classification study. It makes this provision, as plaintiff points out, in language which is mandatory. It cannot be the source of a protected interest in confinement of a capital inmate in the general population, however, for two reasons. First, although the language of the OM is mandatory, it places no substantive limitations on the authority of prison officials to classify a capital inmate. It merely mandates a procedure, and procedural requirements cannot, in and of themselves, create protected interests. Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983). Second, and more fundamentally, OM 201.002.101 expressly provides that "capital inmates automatically will be placed on Administrative Detention status and housed on D Wing in Housing Unit #4." This undercuts any claim that the OM creates an interest in favor of a capital inmate in being placed in the general population. I take as true plaintiff's allegation that he has never had a classification study. There is nothing in the OM which would entitle him to such a study as a matter of federal law, however; at most the failure to prepare such a study might give rise to a state law claim. OM 201.002.101 cannot be the source of the protected interest plaintiff claims.

Plaintiff next points to language contained in the Classification Manual, providing for certain procedures in the event an inmate is to be classified and assigned to administrative segregation.[3] The language used here, as quoted by plaintiff, is mandatory. Once more, however, the provisions merely dictate procedures. They place no substantive limitations on the authority of prison officials to place inmates in administrative segregation and cannot be the source of a protected interest. Olim, 461 U.S. at 249-50. More importantly, plaintiff alleges that the Classification Manual provides that "written policy and procedure shall provide for special confinement of inmates sentenced to the death penalty." The written policy and procedure for this special confinement is found in OM 201.002.101, which provides for automatic placement

[3] These procedures are (1) written notice of reasons for placement in segregated confinement; (2) an impartial hearing before appropriate classification committee within ten working days following the placement in immediate segregation; (3) hearings before the classification committee for periods of up to but not exceeding ninety days; and (4) a written copy of the decision reached at such a hearing.

in administrative segregation. Thus, the procedures generally required for placement in administrative segregation are not applicable to inmates such as plaintiff who are sentenced to death. The Classification Manual cannot be the source of a protected interest in general population placement, nor can it be read to require the application of ordinary classification procedures to capital inmates.

The allegations of the complaint do not state any sort of claim that an inmate sentenced to death has a constitutionally protected interest in placement in the general population as a matter of initial classification. Indeed, they affirmatively disclose that inmates subject to such a sentence will automatically be placed in administrative segregation. This aspect of plaintiff's due process claim is without merit.

B. Periodic Review

Plaintiff also claims that his continued confinement in administrative segregation violates due process. He claims the entitlement to periodic review of the status of such confinement. Plaintiff alleges that he has the opportunity to appear before a Housing Unit #4 segregation status review committee on a monthly basis, and that he has received an annual classification review before the Housing Unit Classification Committee in 1987 and 1988. He contends that these reviews are not "meaningful" in that the result of these reviews--continued confinement in administrative segregation--is foreordained by virtue of his being sentenced to death.

In making the contention that he is entitled to meaningful review, plaintiff relies on language of three court decisions. In Hewitt, the Court stated that administrative segregation cannot be used as a pretext for indefinite confinement of an inmate. Id. at 477 n. 9. He points to similar language in the Eighth Circuit decision of Kelly v. Brewer, 525 F.2d 394 (8th Cir. 1975), and this court's decision in Heathman v. Benson, CV81-L-227 (D. Neb. August 9, 1983) (unreported memorandum). Based on these decisions, plaintiff claims that his continued segregation without meaningful review denies him liberty without due process.

In Heathman, this court addressed, at least partially, a then-existing practice at NSP of placing inmates in disciplinary segregation for periods of years, due to past misconduct. Based on the fact that many of these placements were shortened, as a result of the behavior of the inmate while in segregation, the court rejected the label "disciplinary segregation" and considered the confinement to be administrative. Id., slip op. at 6. In light of this conclusion, the court imposed periodic review requirements on inmates so placed, including a requirement that each inmate be given an opportunity to appear before a

review committee at least once each month. Id. In addition, there is language in the decision which indicates that such review must be "meaningful" in that it must be based on the behavior of the inmate. Id., slip op. at 7.

Kelly involved a similar situation at the Iowa State Penitentiary. There, the court held that the nature of an inmate's offense, even if it involved the killing of a prison employee, did not in and of itself justify indefinite administrative segregation. Id. at 401. Prison officials were therefore required to conduct some sort of periodic review of the segregated confinement. While the officials were free to consider the nature of the inmate's offense as a factor in determining whether to continue segregation, consideration of other objective criteria was also required. Id. at 402.

The implicit assumption of both Kelly and Heathman is that the inmates in those cases had a protected interest in not being confined in administrative segregation. Neither case engages in express discussion of the source of such an interest. It is now clear, however, that the interest does not arise from the Constitution itself. Hewitt, 459 U.S. at 468. Any interest of this sort must arise from state law or regulations. Id. at 469. As discussed above, the state regulations governing the confinement of capital inmates expressly provide that they will be confined in administrative segregation, and therefore do not create a protected interest in confinement in the general population. They are confined there from their arrival at the prison, and remain there so long as they are under sentence of death.[4] Under these circumstances, the continued confinement of plaintiff in administrative segregation does not deprive plaintiff of any federally protected interest. See Parker v. Cook, 642 F.2d 865, 874 n. 7 (5th Cir. 1981) (Unit B). Plaintiff

[4] Plaintiff was, as noted above, confined in the general population for approximately the first three years after his arrival at NSP, with the exception of certain periods when a date had been set for his execution. The change in this policy which resulted in his initial placement in administrative segregation was allegedly made in accordance with the consent decree in Ballew, and any protected interest he may have had in remaining in the general population prior to that change was deprived in a manner consistent with due process. Even if it was not, a claim based on that deprivation has been long since time-barred by the applicable statute of limitations. See Epp v. Gunter, 677 F.Supp. 1415, 1419 (D. Neb. 1988) (applicable limitations period to §1983 actions in Nebraska is four year period of Neb. Rev. Stat. §25-207). The fact that plaintiff was once in the general population does not in and of itself give rise to any protected interest; plaintiff may be treated as a capital inmate who has been in segregation since his arrival at NSP.

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has no entitlement to "meaningful" review of his status in the sense that the term "meaningful" requires prison officials to actually consider his placement in the general population.[5]

As a capital inmate, plaintiff has no protected interest in placement in the general population either at the time of his arrival at NSP or at any time thereafter so long as he is sentenced to death. A protected interest in general population confinement must arise, if at all, under state law. The regulations governing capital inmates do not create such an interest; instead, they contemplate that segregated confinement will continue so long as the death sentence remains in effect. Since no protected interest exists, it is not necessary that plaintiff be afforded any of the procedural protections to which he claims entitlement. The due process claims provide no basis for relief.

III. EQUAL PROTECTION

Plaintiff contends that the placement of capital inmates in segregated confinement denies him equal protection. He alleges that the sole basis for his segregation is the "conclusive presumption" adopted by prison officials that inmates sentenced to death pose a greater threat to prison security than those who are not. While he states that this presumption has "some intuitive appeal," he contends that it loses weight as applied to him, noting that he has actually accumulated sufficient custody rating points to be classified as a medium security prisoner. He also claims that there are general population inmates at NSP who have a record of violence, suicide, and attempted escape but who are not segregated, while there are capital inmates, apparently including himself, who have no demonstrated record of such problems.

The Equal Protection Clause "is essentially a command that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). For the moment, I am willing to assume that capital and non-capital inmates confined in NSP are similarly situated, although

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[5] This does not mean that periodic review may be dispensed with altogether. The Eighth Amendment may require some review of lengthy segregated confinement in order to make certain that the conditions of that confinement do not become "cruel and unusual punishment." See Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984). Such review would not necessarily mean that prison officials would have to consider placing a capital inmate in the general population, however. A finding that the conditions of segregated confinement were cruel and unusual could be rectified simply by changing the offending conditions, although the inmate would remain on segregated status.

the nature of the sentence imposed on capital inmates makes that assumption by no means clear. Even assuming similar situation, however, equal protection does not require precise uniformity of treatment; states remain free to make certain classifications which impact persons differently. So long as the classifications are not based on suspect criteria such as race, they will withstand equal protection attack if they are reasonably related to a legitimate governmental objective. See, e.g., G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408 (1982); Schweiker v. Wilson, 450 U.S. 221, 230 (1981). There is no allegation that the segregation of capital inmates is based on any sort of suspect classification. See Lee v. Washington, 390 U.S. 333, 334 (1968) (segregation of prisoners based on race). Therefore, the segregation of capital inmates is permissible if it is reasonably related to a legitimate governmental objective.

Even putting aside the broad discretion which federal courts must afford prison officials in matters of institutional security, Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1987); Little v. Norris, 787 F.2d 1241, 1244 (8th Cir. 1986), this standard of equal protection review is highly deferential. First, plaintiff bears the burden of demonstrating that the segregation of capital inmates is irrational. "Those challenging legislative judgments must convince the court that the legislative facts could not reasonably be conceived to be true by the governmental decisionmaker." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). Second, the justifications for the differing treatment need not be expressly described by the prison administrators themselves; this court may take judicial notice of additional considerations which support the judgments made by state officials. Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 674 (1981); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938). Third, this court need not be convinced that the segregation of all capital inmates is the most effective means of achieving the goal of institutional security. So long as the challenged practice "advances a legitimate an identifiable governmental objective, we must disregard the existence of other methods . . . that we as [judges] perhaps would have preferred." Schweiker, 450 U.S. at 235. In the final analysis, so long as "it is evident from all the considerations presented to [prison officials] and those of which we may take judicial notice that the question is at least debatable," the policy must withstand equal protection challenge. Carolene Products, 304 U.S. at 154.

The complaint states that the objective of prison officials in segregating capital inmates is to promote the security and good order of the institution. Clearly, this is a legitimate, if not compelling, governmental interest. Hewitt, 459 U.S. at 468. The segregation of capital inmates is justified by the defendants, according to the complaint, because such inmates pose

a greater risk of suicide, or attempted escape.[6] Further, although not stated in the complaint, it could reasonably be concluded that capital inmates are more likely to engage in violent attacks on others given their history of violence and the lack of any meaningful additional penalties which could be imposed on them. These factors make it clear that the segregation of capital inmates as a class is reasonably related to the legitimate governmental objective of prison security.

Plaintiff's claim that the segregation of inmates establishes a "conclusive" presumption does not advance the equal protection analysis. Such presumptions are inherent in any sort of legislative or administrative classification. See Weinberger v. Salfi, 422 U.S. 749, 772. They are not constitutionally impermissible so long as they are rational. Id. at 768-72. See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-24 (1976). It is not irrational to conclude that capital inmates pose a greater threat to prison security than other inmates, and treating them as a group, rather than as individuals, is not constitutionally forbidden.

Similarly, plaintiff's allegations that he personally does not pose this type of security threat and that certain general population inmates do cannot provide a basis for an equal protection claim. This is essentially a claim that the classification is over-inclusive, because it applies to capital inmates who, as individuals, may not pose the identified security threats and under-inclusive, because it does not segregate non-capital inmates who may pose the same threats. These concepts simply cannot be considered at this level of equal protection review. As the Supreme Court has noted:

> If the classification has some reasonable basis it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Dandridge v. Williams, 397 U.S. 471, 485 (1970). The Eighth Circuit, considering an equal protection challenge to a Missouri rule prohibiting students from being eligible for high school athletics for a year after a transfer to another school, made a similar observation:

> Once a rational relationship exists [between

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[6] In Otey v. Best, CV79-L-301, (D. Neb. August 27, 1981), aff'd, 680 F.2d 1231 (8th Cir. 1982), this court made specific findings that these concerns presented a legitimate basis for prohibiting a capital inmate from participating in congregate religious services. Id., slip op. at 2.

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> the rule and the state interest], and it exists here, judicial scrutiny must cease. Whether the rule is wise or creates undue individual hardship are policy decisions better left to legislative and administrative bodies.

In re United States ex rel. Missouri State High School Activities Ass'n, 682 F.2d 147, 152 (8th Cir. 1982).

There is a reasonable relationship between the segregation of capital inmates and the state interest in prison security. The allegations that such a classification is over and under-inclusive, which I take as true, are simply not relevant to the equal protection inquiry. There is nothing in the Constitution which requires the state to make individualized determinations as to whether particular capital inmates are a threat to security. For a federal court to order state officials to undertake a task which would be, to say the least, difficult, would be far too great of an intrusion into the realm of prison administration. The equal protection claim provides no basis for relief.

IV. EIGHTH AMENDMENT

Plaintiff's Eighth Amendment claim is couched in terms similar to his equal protection attack. He contends that his segregated confinement is punishment without penological justification, and therefore is cruel and unusual. Simply stated, plaintiff contends that there is no reason to hold him in segregation.

It must be made clear what this claim is not. Segregation, even involving solitary confinement, is not per se unconstitutional. See, e.g., Hancock v. Unknown United States Marshal, 587 F.2d 377, 378-79 (8th Cir. 1978); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 207 (8th Cir. 1974); Finney v. Hutto, 410 F.Supp. 251, 275 (E.D. Ark. 1976), aff'd, 548 F.2d 740 (8th Cir. 1977), aff'd, 437 U.S. 678 (1978). Likewise, there is nothing alleged to support a claim that the totality of the physical conditions of plaintiff's confinement amounts to cruel and unusual punishment. Rhodes v. Chapman, 452 U.S. 337, 362-63 (1981) (Brennan, J., concurring); Tyler v. Black, 811 F.2d 424, 433-34 (8th Cir. 1987). Instead, this claim focuses on another aspect of the Cruel and Unusual Punishments Clause: whether the segregated confinement in which plaintiff is held is "totally without penological justification." Rhodes, 452 U.S. at 346 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

It does not appear that this question calls for an inquiry any more searching than the equal protection analysis discussed above. Indeed, the Supreme Court has recently indicated that reasonableness is the standard by which the a number of the

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constitutional claims of prisoners must be judged. See Turner v. Safley, ___ U.S. ___, 107 S.Ct. 2254, 2261 (1987) (First Amendment claim). As concluded above, the segregated confinement of all inmates sentenced to death is not per se unreasonable. It bears a rational relationship to legitimate penological interests. It would be inappropriate for this court, under the guise of the Eighth Amendment, to require prison officials to make an individualized determination as to which death row inmates are dangerous enough to be segregated and which can be housed in the general population. Prison officials are dealing with individuals who have committed capital crimes, and on whom the judicial system has imposed the ultimate penalty. Given "the qualitative difference of death from all other punishments," Caldwell v. Mississippi, 472 U.S. 320, 329 (1985), the segregation of capital inmates as a class cannot be said to be totally without penological justification.

V. CONCLUSION

Plaintiff has raised a number of claims in this case, and review of them has required considerable discussion. The essence of the case, as noted initially, goes to the authority of the state to segregate capital inmates from the general prison population. The exhibits to the complaint, the OM and the grievance responses, make it clear that the state does not intend to permit capital inmates to be confined in the general population. Given the lack of a constitutional interest in such confinement, there can be no claim of a constitutionally protected interest; the state would have to create one and it is clear it has not done so. The real issue then is whether, from a substantive standpoint, segregation of capital inmates is permissible. Because the complaint discloses on its face legitimate state interests to be served by such segregation, and because segregation reasonably serves those interests, I conclude that it is permissible. This action should be dismissed.

IT THEREFORE IS HEREBY RECOMMENDED, pursuant to 28 U.S.C. §636(b)(1)(B), that this action be dismissed.

Plaintiff is hereby notified that unless objection is made within eleven days after he is served with a copy of this recommendation, he may be held to have waived any right he may have to appeal the court's order adopting this recommendation.

Dated February 22, 1988.

BY THE COURT

David L. Piester
United States Magistrate

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN E. RUST, Petitioner,

vs.

FRANK O. GUNTER, HAROLD W. CLARKE, GARY GRAMMER, FRANCIS X. HOPKINS, MARIO PEART, JOHN T. EGGERS, ROGER PEHRSON, DOUGLAS ADAMS, ROBERT BENSON, TERRY KIENE, RUSSELL SCHUSTER, MICHAEL R. FORD, KARL EISBACK, NEBRASKA STATE PENITENTIARY HOUSING UNIT #4 CORRECTIONAL OFFICERS/ CORPORALS, NEBRASKA STATE PENITENTIARY CLASSIFICATION COMMITTEE MEMBERS, Respondents.

STATE OF NEBRASKA)
) SS. AFFIDAVIT OF SERVICE
COUNTY OF LANCASTER)

THE UNDERSIGNED, John E. Rust, being first duly sworn upon his oath, deposes and states that he is the Petitioner herein; that a copy of the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was sent to Respondents' attorney: Marie C. Pawol, Assistant Attorney General, 2115 State Capitol Building, Lincoln, Nebraska 68509, by United States mail, postage prepaid, this 23d of October 1989.

Further Affiant Sayeth Not.

John E. Rust
John E. Rust, Affiant

SUBSCRIBED AND SWORN to before me on this 23 day of Oct 1989.

Jo Gray
NOTARY PUBLIC

GENERAL NOTARY State of Nebraska
JO GRAY
My Comm. Exp. March 17, 1991